92-455

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

KNOX COUNTY SCHOOL SYSTEM,

Petitioners,

vs.

JASON BABB, a Minor, Through his Parents and Next Friends JOE AND SHARON BABB,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE DECISIONS OF THE THIRD AND NINTH CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA WHICH RECOGNIZE A DISTINCTION BETWEEN SERVICES AND RESIDENTIAL PLACEMENTS NECESSITATED BY FACTORS OTHER THAN EDUCATION AND THOSE WHICH ARE EDUCATIONALLY NECESSARY AND FOR WHICH EDUCATIONAL AUTHORITIES ARE RESPONSIBLE UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT?

2. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT IF THE EDUCATIONAL PLAN PROVIDED TO A CHILD IS INAPPROPRIATE, THEN ANY UNILATERAL PLACEMENT MADE BY THE PARENTS IS COMPENSABLE, EVEN IF THE PLACEMENT DOES NOT COMPORT WITH 34 C.F.R. § 300.550-552 (REQUIRING THAT A HANDICAPPED CHILD SHOULD BE PLACED IN THE LEAST RESTRICTIVE ENVIRONMENT) AND EVEN IF THERE IS NO EVIDENCE THAT THE PARTICULAR PLACEMENT MADE BY THE PARENT WAS CONSIDERED NECESSARY FOR EDUCATIONAL PURPOSES?

LIST OF PARTIES

A. PLAINTIFF JASON BABB, A MINOR, THROUGH HIS PARENTS AND NEXT FRIENDS JOE AND SHARON BABB. Jason Babb is a minor who at the time of these proceedings fell within the jurisdiction of the Knox County School System.

B. DEFENDANT KNOX COUNTY SCHOOL SYSTEM. The Knox County School System is the local education agency which at the time of these proceedings was responsible for the education of Plaintiff Jason Babb.

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OPINIONS BELOW

A. *Jason Babb, b/n/f Joe and Sharon Babb v. Knox County School System,* CA #91-5500 (6th Cir., May 29, 1992). (Appendix, p. 1a, *et seq.*)

B. *Jason Babb, b/n/f Joe and Sharon Babb v. Knox County School System*, CIV #3-89-992 (E.D. Tenn., March 13, 1991). (Appendix, p. 16a, *et seq.*)

C. *In RE: Jason Babb*, Case #89-23 (October 25, 1989). (Appendix, p. 25a, *et seq.*)

GROUNDS FOR JURISDICTION

A. DATE JUDGMENT ENTERED, May 29, 1992.

B. 28 U.S.C. § 1254

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 20 U.S.C.A. § 1401(a)(17)

(a) As used in this chapter —

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, and medical and counseling services, including rehabilitation counseling, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

B. 34 C.F.R. § 300.302 (Residential Placement)

> If placement in a public or private residential program is necessary to provide special education and relate services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.
>
> Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as state school for the deaf or blind.

C. 34 C.F.R. § 300.550 [(b)(Least Restrictive Environment) (General)]:

> (b) Each public agency shall ensure:
>
> (1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and
>
> (2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

D. 34 C.F.R. § 300.552 (Placements):

Each public agency shall ensure that:

(a) Each handicapped child's educational placement:

(1) is determined at least annually,

(2) is based on his or her individualized education program, and

(3) is as close as possible to the child's home.

(b) Various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school where he or she would attend if he or she were not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

STATEMENT OF THE CASE

This case arises from a decision of the Sixth Circuit Court of Appeals overruling the District Court for the Eastern District of Tennessee, which opinion was filed May 29, 1992. The Sixth Circuit Court of Appeals held that:

(1) The Plaintiff Jason Babb was "severely emotionally disturbed" as that term is defined at 34 C.F.R. § 300.5(b)(8) and that therefore Jason Babb was qualified as "handicapped" under the Act;

(2) That as Jason Babb was eligible for handicapped services his placement at Peninsula was a reimbursable educational placement regardless of the parents' motivation for placing him there; and

(3) That despite the fact that the district court found that the Peninsula Hospital Acute Care Treatment Program was the most restrictive environment Jason could have been placed in and therefore did not comport with the intent of the Individuals with Disabilities Education Act, the Peninsula placement was nonetheless more appropriate than that which Jason had received from the Knox County School System and that therefore Jason's parents were entitled to reimbursement of the expenses of the Peninsula placement.

At all times relevant to this lawsuit, Jason Babb was a 13 year-old boy who lived in Knox County with his father and stepmother. The record in this cause was replete with allegations by Jason's step-mother that he had engaged in a series of outrageous and unexplainable behaviors (R7: S. Babb at T.R. 46-48) although no evidence was presented to corroborate any of Mrs. Babb's allegations.

From approximately 1985 to 1988 Jason lived with his non-custodial mother and step-father in North Carolina, until he was returned to his custodial parents in November of 1988 by his North Carolina step-father (R7: S. Babb at T.R. 36). Mrs. Babb testified at the administrative hearing that she had no contact with Jason's mother during the period that Jason lived in North Carolina and further testified that during that three-year period the Babbs' made

only one trip to North Carolina to see Jason. Mrs. Babb further testified that when Jason's step-father brought him back to Knox County from North Carolina the Babbs' had no warning that they were coming and apparently were not aware of the circumstances which they alleged resulted in Jason's being returned from North Carolina until the day in November 1988 when Jason was returned to Knox County (R7: S. Babb at T.R. 68-69).

The day after Jason was returned to Knox County, Mrs. Babb took him to South Middle School in Knox County where Mrs. Babb met with Assistant Principal David Wilson and Sandra Burnett, the school psychologist at South Middle. At this meeting, Mrs. Babb related to Ms. Burnett the stories about Jason's behavior which were told to her by Jason's step-father and requested that a psychological evaluation be performed on Jason (R7: S. Babb at T.R. 71).

After observing Jason in a school setting for about two months, Ms. Burnett began a full psychological evaluation of Jason (R7: S. Babb at T.R. 73). Ms. Burnett in her testimony related that the behaviors she observed Jason engaging in, while somewhat disruptive and oppositional, were certainly within the range of behaviors one would expect from an adolescent male. These observations were confirmed by Mr. David Wilson, the assistant principal at South Middle (R7: S. Burnett at T.R. 260-261; R7: D. Wilson at T.R. 212-213). Ms. Burnett also performed a battery of psychological evaluation tests upon Jason. At the conclusion of her testing and observation of Jason, Ms. Burnett concluded that Jason was not learning disabled or severely emotionally disturbed and ultimately concluded that Jason was not eligible for handicapped educational services under IDEA (R7: S. Burnett at T.R. 259-262).

After reaching this conclusion, Ms. Burnett met with Mrs. Babb to explain to her the evaluation and its findings. The tests

and observations were explained to Mrs. Babb along with the conclusion of the testing and Mrs. Babb demonstrated her agreement with the conclusions of Ms. Burnett's evaluation by signing a statement to that effect (R7: Burnett at T.R. 263-265; R7: Exhibit No. 17-M-Team Report). It is important to note that both the Administrative Law Judge and the Judge for the District Court for the Eastern District of Tennessee found that "Mrs. Babb was fully apprised of all rights that she and Jason retained under the EHA, including the right to an independent evaluation and the right to object to or disagree with the M-Team's finding." (*Babb v. Knox County School System*, Civ. No. 3-89-922, Appendix p. 19a).

One week after this meeting, Mrs. Babb removed Jason from the Knox County School System and committed him to Peninsula Hospital (R7: S. Babb at T.R. 45).

All of the parties who had occasion to characterize the Peninsula facility referred to it as a "hospital". Thus, for example, when Mrs. Babb was asked about Lakeshore, another psychiatric hospital located in Knox County, she replied that Lakeshore was "a mental institution similar to Peninsula but it is State run" (R7: S. Babb at T.R. 65). Reba Jenkins, the Director of Adolescent Education at Peninsula, described Peninsula as "a psychiatric hospital" (R7: R. Jenkins at T.R. 101). Further, the testimony of Becky Shimoney, the Coordinator of Family Therapy in the Adolescent Services Department at Peninsula Hospital, makes it abundantly clear that while Jason was receiving three (3) hours of school per day while at Peninsula, the vast majority of his time was taken up by psychiatric and psychological therapy (R7: B. Shimoney at T.R. 114-123). Finally, Ms. Shimoney described the Peninsula program as one of "acute hospitalization" (R7: B. Shimoney at T.R. 119), and further testified that the purpose of the school program at Peninsula is "to not interrupt their education while they are in the hospital" (R7: B. Shimoney at

T.R. 127). Based on its review of the testimony, the district court found that "the education provided Jason at Peninsula was incidental to the primary purpose of acute psychiatric treatment." (*Babb v. Knox County School System*, Civ. No. 3-89-922, Appendix p. 19a). This finding of fact was not challenged by the Sixth Circuit Court of Appeals.

After a little less than six (6) months in the Peninsula Hospital program, Jason was discharged. At a meeting between Peninsula staff and the Babbs', at which meeting the Babbs' attempted to convince the Peninsula staff to keep Jason in the hospital because they did not want Jason in their home, the Peninsula staff informed the Babbs' that the Peninsula Acute Care Psychiatric Program was not appropriate for Jason and suggested that Jason be sent to live with his grandmother in North Carolina (Family Meetings Notes, Appendix p. 29a-30a).

After an exhaustive two day hearing the Administrative Law Judge assigned to this case found that the Babbs' decision to place Jason in Peninsula, an acute care psychiatric hospital, was a decision based on his medical rather than his educational needs (In RE: Jason Babb, Appendix p. 25a). The Babbs' appealed this decision to Federal District Court for the Eastern District of Tennessee. After a *de novo* hearing the court, per Judge Jarvis, again found as a matter of fact that the primary reason for the Babbs' decision to place Jason at Peninsula was to address his medical needs (*Babb v. Knox County School System*, Civ. No. 3-89-922, Appendix p. 16a). In each case, as the court found that Jason's placement at Peninsula was not an educational placement, it held that no reimbursement could be had through IDEA.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

20 U.S.C. § 1415(e)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE DECISIONS OF THE THIRD AND NINTH CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA WHICH RECOGNIZE A DISTINCTION BETWEEN SERVICES AND RESIDENTIAL PLACEMENTS NECESSITATED BY FACTORS OTHER THAN EDUCATION AND THOSE WHICH ARE EDUCATIONALLY NECESSARY AND FOR WHICH EDUCATIONAL AUTHORITIES ARE RESPONSIBLE UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

The Individuals with Disabilities Education Act (IDEA) and its implementing regulations require the provision of "related services" and "residential placements" where appropriate to meet the unique needs of disabled children. 20 U.S.C.A. § 1401 (a)(17); 34 C.F.R. § 300.302. However, the obligation of school authorities to provide such services and residential placements is limited to a child's educational need for them.

Related services are defined under the Act as follows:

> The term "related services" means transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, and medical and counseling services, including rehabilitation counseling, except that such medical

> services shall be for diagnostic and evaluation purposes only) as may be *required to assist the child with a disability to benefit from special education*, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C.A. § 1401(a)(17) (Emphasis Added)

Likewise, the federal regulation implementing the IDEA which provides for residential placement of disabled students states that;

> If placement in a public or private residential program is *necessary to provide special education and related services* to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. § 300.302 (Emphasis Added)

This limitation on the schools' burden was emphasized by the Secretary of Education by inclusion of a Comment to 34 C.F.R. § 300.302 which explains that "This requirement applies to placements which are made by public agencies for *educational purposes*, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind." (Emphasis Added)

The question of whether school authorities or other public agencies providing special education services are financially responsible for "residential placements" for disabled students has been visited by various Circuit Courts of Appeals other than the Sixth Circuit Court of Appeals, as well as by the District Court for the District of Columbia. These courts have utilized substantially consistent approaches with regard to this issue, and

have determined that services and placements in residential treatment programs which, when necessary for educational reasons, are included under the Act and its implementing regulations, are not the responsibility of school authorities when the necessity for such service or placements is based upon other factors.

In the case of *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990) the Ninth Circuit Court of Appeals held that a child's residential placement was primarily for medical, psychiatric reasons, and thus was not an educationally related service for the cost of which the school district was responsible under the Act. In so holding, the Ninth Circuit Court of Appeals ruled that a proper analysis in such cases must focus on whether the residential placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that are necessary quite apart from the learning process. *Clovis*, at p. 643.

Similarly, in a case in which the financial responsibility for a full-time residential placement of a handicapped child was presented, the Third Circuit Court of Appeals held that the court's focus must be on whether a full-time placement is considered necessary for educational purposes, or is in response to medical, social or emotional problems that are segregable from the learning process. *Kruelle v. Newcastle County School District*, 642 F.2d 687, 693 (3rd Cir. 1981). Indeed, as pointed out by the court in *Kruelle*, the language of the Act requires courts to assess the link between the supportive service or placement and the child's learning needs. *Kruelle*, at p. 694.

As with the Third and Ninth Circuit Courts of Appeals, the United States District Court for the District of Columbia, when faced with the same question of financial responsibility for a

residential placement, held that where such a placement is made for medical reasons as opposed to educational reasons, a school authority is not responsible for the cost of non-medical care and room and board for such a placement. *McKenzie v. Jefferson*, 566 F. Supp. 404, 411 (D.C.D.C. 1983).

In this case the administrative law judge who heard the testimony of the parties' witnesses and examined the evidence presented by the parties first hand found that the respondent's admittance to the Peninsula Psychiatric Hospital was for medical reasons unrelated to the child's educational needs. (In RE.: Jason Babb, Appendix p. 25a). Upon *de novo* review by the Federal District Court for the Eastern Distrtict of Tennessee it was that court's finding that the reason for Jason Babb's placement at the Peninsula Psychiatric Hospital was primarily medical. The court found specifically that the education Jason received at Peninsula was incidental to the psychiatric care for which he was primarily there. (*Babb v. Knox County School System*, Civ. No. 3-89-922, Appendix p. 19a-20a).

On appeal the Sixth Circuit Court of Appeals avoided, if not totally ignored, the well-reasoned analysis suggested by the Third and Ninth Circuit Courts of Appeals and the Federal District Court for the District of Columbia and, based on an attack on the appellant's School System's psychologist's evaluation of the appellee, found for the first time that the appellee was seriously emotionally disturbed under the definition of that term contained in the federal regulations and was thus entitled to services under the Act. (*Babb v. Knox County School System*, CA No. 91-5500, Appendix p. 6a-7a). Further, the court held that the residential placement unilaterally obtained by the parents of the child was reimbursable. (*Babb v. Knox County School System*, CA No. 91-5500, Appendix p. 12a-13a). It is notable that while the court found fault with the appellant's psychological evaluation of the appellee, the appellee's own expert witness testified at the hearing

that the appellant's psychological evaluation was sound. (R7: B. Lyons at T.R. 160). Indeed, the district court found no fault with the school psychologist's evaluation report. (*Babb v. Knox County School System*, Civ. No. 3-89-922, Appendix p. 18a).

Instead of applying the analysis prescribed by other Circuit Courts in similar cases, the circuit court in this case held that "Any attempt to distinguish academics from treatment when defining 'educational placement' runs counter to the clear language of the act". (*Babb v. Knox County School System*, CA No. 91-5500, Appendix p. 12a, *citing, Tilton v. Jefferson County Board of Education*, 705 F.2d 800 at 803 (6th Cir. 1983)).

The conflict between *Clovis, Kruelle,* and *McKenzie,* and the Sixth Circuit's decision in this case is especially troubling since it suggests that a service or "treatment" is required to be provided and paid for by school authorities regardless of the basis for a child's need for such service or treatment.

In summary, the language of the Act and its implementing regulations indicate clearly that school authorities are responsible for providing as related services only those services and residential placements which are necessary for the child to benefit from special education. The Sixth Circuit's ruling in this case is in error as it fails to recognize this limitation on the obligations of school authorities as recognized by other circuit courts. Accordingly, this Court should exercise its discretion to resolve this conflict between the Circuits and reverse the Circuit Court of Appeals decision in this case.

II.

THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT IF THE EDUCATIONAL PLAN PROVIDED TO A CHILD IS INAPPROPRIATE THAT ANY UNILATERAL PLACEMENT MADE BY THE PARENTS IS COMPENSABLE, EVEN IF THE PLACEMENT DOES NOT COMPORT WITH 34 C.F.R. § 300.550-552 (REQUIRING THAT A HANDICAPPED CHILD SHOULD BE PLACED IN THE LEAST RESTRICTIVE ENVIRONMENT) AND EVEN IF THERE IS NO EVIDENCE THAT THE PARTICULAR PLACEMENT MADE BY THE PARENT WAS CONSIDERED NECESSARY FOR EDUCATIONAL PURPOSES.

In *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985) this court established the right of parents to recover expenses incurred when they made unilateral private placement decisions during the pendency of due process proceedings under the EHA (now known as "IDEA"). *Burlington*, 471 U.S. 359 at 369, 85 L. Ed. 2d 385 at 395. However, in coming to this conclusion this court wrote that:

> While we doubt that this provision would authorize a Court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.

Burlington, 471 U.S. 359 at 373-374, 85 L. Ed. 2d at 397.

While in *Burlington* this court only stated explicitly that parents would be barred from reimbursement if the school

suggested placement were ultimately found to be appropriate, subsequent courts have held in addition that a court must find that the placement made by the parents must itself be appropriate before a court will order reimbursement for that placement. Thus, for example, the Sixth Circuit Court of Appeals has written that:

> Reimbursement will be made for private placement if the initial decision to place the child in a private school is made solely by the parents. The District Court must first, of course, determine that the private placement was proper. *Janzen v. Knox County Board of Education*, 790 F.2d 484 at 46 (6th Cir. 1986).

It is abundantly clear both from the language of the IDEA and from the case law which has interpreted the Act that one of the overriding goals of Congress in enacting the Act was to end or severely limit the practice of segregating handicapped students from the general student population. Thus, at 20 U.S.C. § 1400(b)(4) the Congress found specifically that "one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers". In an effort to correct the situation the Congress found regarding the exclusion of handicapped children from the public school setting, Congress enacted 20 U.S.C. § 1412(5), which requires that the states establish

> procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, •or other removal of handicapped children from the regular educational environment

> occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . .

This requirement has been more fully codified at 34 C.F.R. § 300.550-300.556.

The federal courts have been unanimous in finding that individualized educational programs (IEP's) which do not take into account the "least restrictive environment" mandate contained in 20 U.S.C. § 1412 and 34 C.F.R. § 300.550 *et seq.* are per se inappropriate, and the courts have routinely invalidated plans which did not call for the placement of the handicapped child in the least restrictive environment appropriate to his particular handicap.

Thus, the Sixth Circuit Court of Appeals in the seminal case of *Roncker on behalf of Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) vacated the district court decision which upheld the school's proposed placement of a handicapped child in a school facility dedicated entirely to mentally retarded children on the grounds that the District Court had not considered whether or not the services required for the child's education could have been provided in a setting which would have allowed the child access to non-handicapped peers. In *Kruelle v. Newcastle County School District*, 642 F.2d 687 (3rd Cir. 1981), the Circuit Court for the Third Circuit upheld the decision of the Delaware District Court ordering a residential placement of a handicapped child only after finding that the court had "carefully" undertaken an analysis of the mainstreaming policy embodied under IDEA. *Kruelle*, supra at 695.

In the instant case, the Sixth Circuit Court of Appeals has chosen to embark upon a new path regarding the availability of

reimbursement to parents who make unilateral placement decisions. The Sixth Circuit explicitly recognized the district court finding that the Babbs' placement of Jason in Peninsula Hospital was the most restrictive environment available, and that as such was in conflict with the least restrictive environment provisions contained at 20 U.S.C. § 1412(5). The Sixth Circuit made no attempt to dispute or overturn this finding of fact. However, the Sixth Circuit found that as between the educational program offered by the school system and the program offered by Peninsula, the Peninsula program was to be preferred. Thus, the court wrote that

> The District Court found that the Babbs' private placement of Jason was the most restrictive option and therefore, in conflict with the Act's intent of providing the best education in the least restrictive manner possible. We are faced, however, with two options: the school's choice of inaction, which would have ultimately resulted in Jason's expulsion, versus the Babbs' choice of a residential program with counseling and educational services, which resulted in Jason receiving much-needed psychological care combined with daily educational programming. When comparing these two options, the Babbs' choice best fulfilled Jason's special educational needs. Jason's obvious need for intensive psychological care and a structured educational program was best served by Peninsula.

Babb v. Knox County School System, CA No. 91-5500, Appendix p. 10a.

Here the Sixth Circuit has ruled that if a school system's educational program for a child is found to be inadequate, then the parents may make any unilateral placement decision they wish,

and as long as that placement grants some benefit to the child it will be reimbursable. The court's holding completely ignores the mandate of 20 U.S.C. § 1412(5) and holds that even in the face of a fact finding that the Peninsula program was not appropriate for Jason in that it did not in any way comport with the least restrictive environment requirements set forth in the IDEA, that nonetheless that placement would have to be paid for by the school system. This decision opens the door for any parent who has a dispute with a school system to place their child in the most restrictive environment available, so long as they believe that placement will confer some benefit upon their child. This result is completely at odds with Congress' stated goal of educating handicapped children in as normal a surrounding as possible.

The petitioner would submit that the Sixth Circuit decision seriously misreads the intent of Congress and may well serve to deprive handicapped children of the benefits of mainstreaming which Congress clearly intended to confer upon them. This unprecedented decision by the Sixth Circuit Court of Appeals represents such a departure from past court practice and is so novel that this Court should exercise its power of supervision as called for by Rule 10.1(a) and 10.1(c) of the Rules of the Supreme Court.

CONCLUSION

For the reasons hereinabove discussed, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 29, 1992

No. 91-5500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JASON BABB, a minor, through his parents and next friends, JOE and SHARON BABB,

Plaintiffs-Appellants,

v.

KNOX COUNTY SCHOOL SYSTEM,

Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

Decided and Filed My 29, 1992

Before: KEITH and MARTIN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Joe and Sharon Babb, on behalf of their son Jason, appeal a determination that the Knox County, Tennessee school system has no responsibility for costs associated with time Jason spent in Peninsula Psychiatric Hospital. The Babbs argue that Jason was handicapped under the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1991). They now seek reimbursement for the costs relating to

Appendix A

Jason's stay at Peninsula, arguing that his stay was in keeping with the Act and necessary to provide Jason with appropriate educational services. We agree and reverse the district court's judgment.

Jason Babb has a long history of abnormal behavior and academic failure. Born in 1975, Jason lived with his father and stepmother, the Babbs, until he was eight years old. From the ages eight to thirteen, Jason lived with his mother and stepfather in North Carolina. In November 1988, Jason returned to Knoxville, Tennessee, to again live with his father and stepmother.

Jason's history of trouble began early. At the age of four, he was expelled from pre-school for breaking a gerbil's leg and urinating on other children. At the age of five, he attempted to strangle a female classmate and to set the classroom Christmas tree on fire. During the next five years, Jason's behavior did not improve. He continued to have difficulty in school and the school eventually threatened to expel him for his behavioral problems. In addition to his problems at school, he also set a house on fire causing some nine hundred dollars in damage. He also broke his stepbrother's arm at least once during this period. Finally, in November 1988, Jason's mother and stepfather felt that they could no longer control Jason and they asked the Babbs to take him back.

The day after Jason returned to Knoxville, Mrs. Babb enrolled him in South Middle School, a Knox County public school. At that time, Mrs. Babb told both the school principal and school counselor of Jason's long history of behavioral and academic problems and requested that he be formally evaluated. In January 1989, the school counselor evaluated Jason and concluded that Jason was not seriously emotionally disturbed. The academic and

psychological evaluations were limited, concentrating exclusively on Jason's three months at South Middle School. Following the evaluation, school officials met with Mrs. Babb and informed her that Jason was not eligible for special services under the Education for the Handicapped Act, 20 U.S.C. §§ 1400-1461. At that time, Mrs. Babb signed a statement agreeing with the determination that Jason was not eligible for the special services. Mrs. Babb signed an additional statement acknowledging she had been fully appraised of the rights she and Jason possessed under the Act, including the right to independent evaluation and the right to object to or disagree with the school system's determination of Jason's status.

In mid-February 1989, just one week after receiving the results of Jason's evaluation, the Babbs learned for the first time that during the previous three months, the school had placed Jason on "in school" suspension numerous times and that the school was planning to expel Jason. With this information, the Babbs removed Jason from the Knox County school system and placed him in Peninsula, a private hospital that contains a specially designed educational program for emotionally disturbed children. Jason remained at the hospital and attended classes there for three hours a day from February 21, 1989, until August 1, 1989. At the hospital, a clinical psychologist evaluated Jason and found that Jason was suffering from Conduct Disorder, Severe Solitary Aggressive Type, and Paranoid and Schizoid Traits.

Subsequent to placing Jason at Peninsula, the Babbs requested a due process hearing to determine whether Jason was emotionally handicapped and thus eligible for special educational services under the Education for the Handicapped Act. The Babbs also sought reimbursement for educational expenses associated with Jason's stay in Peninsula. On October 25, 1989, a hearing officer for the

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Tennessee State Department of Education found that the Babbs had placed Jason in Peninsula for non-educational, medical reasons and the Babbs' expenses were not covered under the Act. The hearing officer totally disregarded the fact that the school had been less than candid about Jason, and found that even if Jason had been placed in Peninsula for educational reasons, reimbursement was not appropriate because the Babbs had supplied only a lump-sum billing from Peninsula that included all of Jason's expenses, both medical and non-medical. The hearing officer made very few findings of fact and concluded that the Babbs had the burden of establishing the amount of reimbursement for educational expenses. The hearing officer found that because there was insufficient proof of the appropriate expenses related to education, no award could be made.

The Babbs then challenged this decision in federal district court. The district court affirmed the findings of the administrative law judge, finding that the Babbs had failed to exhaust their administrative remedies. The court specifically found that the Babbs failed to seek a due process hearing challenging the school system's assessment that Jason was not entitled to special services under the Act. The court found that if the Babbs had pursued administrative remedies, less restrictive alternatives might have been arranged. Instead, because the Babbs acted unilaterally, placing Jason in a locked ward in a psychiatric hospital, Jason went from the least restrictive environment of a public school to the most restrictive setting possible. The court found that this change in Jason's circumstances was a clear contradiction of the express legislative purpose of the Act.

The district court further found that Jason was placed in Peninsula for primarily medical reasons and, therefore, expenses incurred at Peninsula related to Jason's education were not

reimbursable. The court also found the Babbs had failed to submit a breakdown of expenses related to education, and even if the Babbs were entitled to reimbursement, the district court would be unable to set the appropriate amount.

The Babbs argue that (1) the district court erred by not determining that Jason was clearly emotionally handicapped and qualified for special services under the Act, (2) the Babbs complied with the administrative exhaustion requirements in a timely fashion, and (3) under the Supreme Court's test in *Burlington School Committee v. Massachusetts Department of Education,* 471 U.S. 359 (1985), the Babb's decision to place Jason in Peninsula was appropriate in light of his educational needs. The Babbs argue that for these reasons, they should be reimbursed for the costs associated with the placement.

The school system responds by arguing that (1) the district court correctly found that the Babb's placed Jason in Peninsula primarily for medical reasons, (2) medical expenses are not reimbursable under the Act, (3) the school system properly found that Jason was not emotionally handicapped and thus did not qualify for special services, and (4) even if the Babbs did qualify for reimbursement, they failed to properly prove which expenses were educational.

One of the primary purposes of the Act is to provide handicapped children with a "free appropriate public education." 20 U.S.C. § 1421(1) (1991). *See Irving Independent School Dist. v. Tatro,* 468 U.S. 883, 891 (1984). Children who are seriously emotionally disturbed are considered handicapped for purposes of the Act. *Clevenger v. Oak Ridge,* 744 F.2d 514, 515 (6th Cir. 1984). "Seriously emotionally disturbed" is defined at 34 C.F.R. § 300.5(b)(8):

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(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

We are convinced, after reviewing the district court's findings of fact and the record, that at the time Jason was enrolled as a student in the Knox County school system and during his time at Peninsula, he was seriously emotionally disturbed under the

provisions of the Act and therefore qualified as "handicapped" under the Act.

Even though standard intelligence quotient testing indicated that he has average to above-average intelligence, Jason Babb has a long history of academic failure that culminated during his three months in the Knox County school system. Testimony in the record indicates that Jason had difficulty making and maintaining friendships. This inability to create normal social bonds no doubt stems, in part, from tendencies that have resulted in physical abuse of siblings and classmates, torture of animals, and property theft and destruction. These outward manifestations are nothing less than road signs marking Jason's tragic mental decline. Psychiatrists diagnosed Jason as a person who was "decompensating into a thought disorder which seems to be increasing in severity as he grows older." Jason's psychiatrists stated that at age thirteen, Jason was suffering from a

> fairly severe degree of psychopathology . . . . [and] exhibit[ed] a highly ideational/schizoid personality style that is marked by underlying rage, paranoid misinterpretation of interpersonal situations, hyper vigilance, affective reactivity, impulsive acting out of unconscious issues, intense splitting, suspiciousness, and withdrawal into fantasy.

Because of their technical expertise, administrative agencies are traditionaly better suited to make these types of determinations. In Jason's case, however, the agency failed to rule on the foundational issue of his condition. The evidence before us is convincing that at the time of the incidents that gave rise to this litigation, Jason Babb was seriously emotionally disturbed and thus, handicapped under the Act, qualifying for the Act's special protections and services.

With this determination, we turn to the question of whether the Babbs should be reimbursed for their expenditures arising from Jason's placement in Peninsula. The Act directs courts to "grant relief as necessary." *Burlington*, 471 U.S. at 369. Courts have broad discretion to fashion appropriate relief. *Id.*

In *Burlington*, the parent of a handicapped child rejected a school system's proposed individualized educational program for the child and pursued administrative due process remedies. At the same time and prior to the exhaustion of administrative remedies, the father enrolled the child in a state-approved, private school in order to meet the child's special educational needs. The father applied for reimbursement of the educational expenses in accordance with the Act. *Id.* at 361-364. The Supreme Court found that under 20 U.S.C. § 1415(e)(2), such reimbursement to parents for private school tuition and related expenses was appropriate. *Id.* at 369. Because exhaustion of administrative remedies and judicial review would be lengthy, retroactive reimbursement for educational expenses and related services may be awarded to parents who unilaterally choose to address a school system's ineffective educational plans by placing their child in a private program and thereafter pursuing remedies for such private placement.

Under *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982), we are charged with considering (1) whether the State complied with the procedures set forth in the Act, and (2) whether the individualized education program developed through the Act's procedures was reasonable calculated to enable the child to realize the educational benefits as mandated by the Act. *Id.* at 206-207. Special emphasis on is placed strict adherence to the Act's procedures. *Id.* at 205. Two circuits have specifically held that the school's failure to comply with the Act's

procedural requirements constitutes a per se violation of the Act. *See Jackson v. Franklin County School Bd.*, 806 F.2d 623, 629 (5th Cir. 1986) ("[F]ailures to meet the Act's procedural requirements are 'adequate grounds by themselves' for holding that the school failed to provide a free and appropriate education, as mandated by the Act."); *Hall by Hall v. Vance County Board of Education*, 774 F.2d 629, 635 (4th Cir. 1985) (school failed to provide a "free appropriate public education" when school did not follow procedural requirements). *See also Hudson By and Through Tyree v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987).

Applying the first part of *Rowley* to the Babbs' case, the school did not strictly adhere to the procedures for determining whether Jason was handicapped. The Act requires school systems that are determining whether a child is handicapped to fully examine the child's academic, emotional, and psychological profile. *See* 34 C.F.R. § 300.531 (school systems must "conduct a full and individual evaluation" of the student (34 C.F.R. §300.532(f) specifically requires school systems to assess a child "in all areas related to the suspected disability, including, where appropriate, health, . . . social and emotional status, general intelligence, [and] academic performance."

Here, the school psychologist failed to examine Jason's complete academic, psychological and behavioral history when she concluded he was not handicapped. The school psychologist did not consult with Jason's psychologist, his mother and stepfather in North Carolina, nor Jason's father, Joe Babb. The school psychologist failed to consult Jason's academic record in North Carolina. This was his most recent history of academic failure. In making the evaluation, the school psychologist only considered Jason's three months in the Knox County school system.

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Turning to the second part of *Rowley*, the school did not create an individualized educational program for Jason and did not meet Jason's specialized needs. Had the school properly complied with the Act's requirements by thoroughly examining Jason, the Babbs and the school system could have worked together to design a proper plan to best meet Jason's needs. The wisdom of hindsight in this instance, however, provides hollow comfort. We examine the Babbs' choice of placing Jason in Peninsula to determine whether it was the appropriate choice that best met Jason's educational needs. *See Burlington*, 471 U.S. at 369-370; 34 C.F.R. § 300.550-552 (requiring that a handicapped child should be placed in the least restrictive setting possible considering the child's individual situation).

The district court found that the Babbs' private placement of Jason was the most restrictive option and therefore, in conflict with the Act's intent of providing the best education in the least restrictive manner possible. We are faced, however, with two options: the school's choice of inaction, which would have ultimately resulted in Jason's expulsion, versus the Babbs' choice of a residential program with counseling and educational services, which resulted in Jason receiving much-needed psychological care combined with daily educational programming. When comparing these two options, the Babbs' choice best fulfilled Jason's special educational needs. Jason's obvious need for intensive psychological care and a structured educational program was best served by Peninsula.

The Knox School Board next argues that the Act specificaly excludes reimbursement of expenditures arising from Jason's placement at Peninsula. The Act defines a free appropriate public education as "special education and related services." 20 U.S.C. § 1401(18). Special education is defined as "specially designed

instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including . . . instruction in *hospitals and institutions.*" 20 U.S.C. § 1401(16) (emphasis added). The act defines "related services" at 20 U.S.C. § 1401(17), as

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, *psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only)* as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. (emphasis added).

The school system argues that any expenses associated with Jason's stay at Peninsula are excluded because Jason's placement was primarily medical. This is not what a common-sense reading of the Act conveys. The plain meaning of this statute requires educating emotionally handicapped children in "hospitals and institutions" when necessary to enable a handicapped child to obtain a "free appropriate public education." Further, the plain language of the Act specifically provides as part of a free appropriate public educaton the psychological and counseling services to which Jason was referred and which he received.

Twice before we have held that school systems are responsible for special educational costs arising from the placement of children in programs such as Peninsula. *See Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514 (6th Cir. 1984); *Tilton v. Jefferson County Bd. of Education*, 705 F.2d 800 (6th Cir. 1983). In *Tilton* this

court rejected the school system's characterization of placement in a private residential program with a psychological counseling component as "treatment" rather than "education," and not reimbursable. *Tilton*, 705 F.2d at 803. We held:

> The concept of education under the Act clearly embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of "treatment." Any attempt to distinguish academics from treatment when defining "educational placement" runs cunter to the clear language of the Act.

Id. See also Tatro, 468 U.S. at 891. We have applied *Burlington* and held that where parents unilaterally place their handicapped children in facilities such as Peninsula and where we later find that decision to be appropriate, school systems must reimburse parents for costs that are related to education and special services arising from that placement. *Jazen v. Knox County Board of Education*, 790 F.2d 484, 486 (6th Cir. 1986) (free appropriate public education includes instruction in hospitals and institutions and related support services such as psychological counseling).

In conclusion, it is plainly evident that Jason Babb is handicapped and is eligible for a free appropriate public education that includes psychological care and related services. The Knox County School System failed to adhere to the procedural requirements to determine whether Jason Babb was handicapped under the Act. As a direct consequence of this omission, Jason Babb was deprived of an individualized educational program to meet his special needs.

This district court's judgment is reversed and the case is

remanded. In deeping with this opinion, the district court shall determine the expenses that are covered under the Act that are to be reimbursed to the Babbs. This fee determination shall include attorney fees as provided for under the Act.

[stamped]
RECEIVED
JUNE 1, 1992
Clerk, U.S. District Court
Eastern District of Tennessee

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION FILED MARCH 13, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-89-922

JASON BABB, a minor, through his parents and next friends, JOE AND SHARON BABB,

Plaintiff

v.

KNOX COUNTY SCHOOL SYSTEM,

Defendant

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that the decision of the administrative law judge denying plaintiffs' entitlement to reimbursement for private placement of their child is hereby AFFIRMED, and this action is DISMISSED.

ENTER:

s/ James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT JUDGE

Appendix B

[stamped]
ENTERED AS A JUDGMENT
MURRAY HAWKINS, CLERK
By s/ Illegible
Dep. Clerk

Date March 13, 1991
Enter Book 129 Page 188

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION FILED MARCH 13, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-89-922

JASON BABB, a minor, through his parents and next friends, JOE AND SHARON BABB,

Plaintiff

v.

KNOX COUNTY SCHOOL SYSTEM,

Defendant

MEMORANDUM OPINION

This is an appeal from an administrative hearing under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401, *et seq.* Plaintiffs seek a review of an administrative finding that the defendant has no liability for plaintiffs' placement of their minor son in a private hospital. This matter was heard *de novo* by the court based upon the administrative record on February 21, 1991. The following constitutues this court's findings of fact and conclusions of law in conformity with Rule 52, Federal Rules of Civil Procedure.

Appendix C

I.

Findings of Fact

1. At the time of the administrative hearing before the court for review, Jason Babb was 14 years old, having been born on April 16, 1975. Prior to his hospitalization at the Peninsula Psychiatric Hospital, he had lived with his stepmother and natural father and had been a student in the Knox County School System since November, 1988.

2. Jason lived with his father and stepmother until the age of 8. From the ages of 8 to 13, he lived with his natural mother and stepfather in North Carolina. This case arose when Jason returned to the home of his natural father and stepmother in November, 1988.

3. Prior to his return to Knoxville in November, 1988, Jason had a lengthy history of deviant behavior and academic failure. At the age of four, he was expelled from a private pre-school for breaking a gerbil's leg and urinating on other students. The next year while in kindergarten, Jason attempted to strangle a female classmate and attempted to set the classroom Christmas tree on fire.

When Jason was eight, Mr. Babb took a job in Holland. Jason was sent to live with his natural mother in North Carolina after Dutch school authorities told the family that Jason could not remain in school due to his behavior. During the next five years, Jason lived with his natural mother and her husband. During this period, he set a house on fire and did $900.00 worth of damage. In November, 1988, Jason's natural mother and stepfather felt that they could no longer control him and asked

the Babbs to take him back.

4. The day after Jason returned to Knoxville in November, 1988, Mrs. Babb took him to his public school for enrollment. She met with the assistant principal, David Wilson, and the school psychologist, Sandra Burnett. Mrs. Babb informed them of Jason's behavioral and academic problems and asked for a formal evaluation of Jason. That request was eventually granted in December, 1988, and the evaluation took place in January, 1989. The evaluation was performed by Ms. Burnett who administered a "standard battery" of tests. One of the psychological tests performed by Ms. Burnett was the Children's Personality Questionnaire Test, which was intended for 12-year-olds. Jason was 13 at the time of administration of this test, and plaintiffs argue that that rendered the test results invalid. However, the proof does not indicate that the administration of this one test improperly affected the ultimate outcome of Ms. Burnett's evaluation. Ultimately Ms. Burnett reported that "it does not appear . . . that he meets the criteria to be eligible for special services."

Ms. Burnett was also aware that while Jason had been talking out of turn in class, was disruptive and argumentative, he had not exhibited to his teachers and other school officials any of the types of deviant behavior which his stepmother had attributed to him. Ultimately, this led to Ms. Burnett's conclusion that Jason was not "seriously emotionally disturbed" and was therefore not entitled to special services.

5. Following the evaluation, school system officials met with Mrs. Babb and told her that Jason was not eligible for services under the Education of the Handicapped Act. At that time Mrs. Babb signed an "M-Team Report" agreeing with the determination

that Jason was not eligible for services under the EHA. The proof shows that Mrs. Babb was fully apprised of all rights that she and Jason retained under the EHA, including the right to an independent evaluation and the right to object to or disagree with the M-Team's finding.

6. Approximately one week later, the Babbs learned that Jason was being sent to in-school suspension and that his expulsion was imminent. However, the Babbs at that time did not appeal the finding that Jason was not entitled to services under the EHA. Rather, they pulled Jason out of public school and placed him in the Peninsula Psychiatric Hospital. Jason resided at the hospital and attended classes for three hours a day there from February 21, 1989, until August 1, 1989.

Although Peninsula Hospital provided three hours of schooling per day, it is primarily a psychiatric hospital. The majority of Jason's time at Peninsula was taken up by psychiatric and psychological therapy. One witness described the Peninsula program as "acute hospitalization" and stated that the purpose of the school program at Peninsula is "to not interrupt their education while they are in the hospital." The court finds that the education provided Jason at Peninsula was incidental to the primary purpose of acute psychiatric treatment. Upon his admission to Peninsula, Jason was evaluated by Dr. Scott Glass, a clinical psychologist, as suffering from Conduct Disorder, Solitary Aggressive Type, Severe; and Paranoid and Schizoid Traits.

Jason was hospitalized from February 21, 1989 to August 1, 1989. The cost of this hospitalization was $16,400.00.

7. Subsequently, the Babbs filed an administrative action

seeking reimbursement for the private placement of Jason at Peninsula Hospital from February 21, to August 1, 1989. The hearing was held before an administrative law judge, following which the ALJ found that Jason's placement at Peninsula was a medical placement rather than an educational one, and that plaintiffs were therefore not entitled to reimbursement for the cost of that placement. The ALJ also found that even if a component of the placement was educational, the plaintiffs failed to break down the portion of the expenses which were medical from those which were educational, and that there was therefore no way by which he could properly apportion the appropriate reimbursement.

The court finds that the placement of Jason at Peninsula in this case was primarily a meuical one. In addition, plaintiffs have failed to divide the expenses into any medical and educational breakdown. Therefore, even if the placement was primarily educational, it would be impossible to properly apportion plaintiffs' damages.

II.

Conclusions of Law

The IDEA was enacted to "assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . ." 20 U.S.C. § 1400(c). Moreover, Tennessee law requires local school systems to provide children with "special education services sufficient to meet the needs and maximize the capabilities of handicapped children." T.C.A. § 49-10-101(a)(1) (1972).

The Act further defines a "free appropriate public education"

to include "special education and related services which . . . had been provided at public expense . . . [and] in conformity with the individualized education program required under § 1414(a)(5) of this Title." 20 U.S.C. § 1401(a)(18)(A)(D). "Special education" is defined as:

> Specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. § 1401(a)(16). The Act also provides a definition of "related services".

> The term "related services" means transportation, and such developmental; corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(a)(17).

The Act is implemented through the "Individualized Education Program" (IEP), which is required for each disabled child. There are elaborate procedural safeguards to insure the full

participation of parents and the proper resolution of disputes regarding the IEP. *Burlington School Committee v. Department of Education,* 471 U.S. 359 (1985). Whenever a local school board refused to change a child's IEP, the child's parents or guardians are given an opportunity to complain about any such matter. 20 U.S.C. § 1415(b)(1)(E). When a complaint is made, the parents are entitled to an impartial due process hearing conducted by a hearing examiner unrelated to the local agency involved. 20 U.S.C. § 1415(b)(2). The Act further provides for full judicial review of the due process hearing. The Sixth Circuit has determined that a *de novo* standard of review is required, but that the district court should give due weight to the State administrative hearing in reaching its decision. *Doe ex rel. Doe v. Smith,* 879 F.2d 1340, 1343 (1989), *cert. denied,* 110 S.Ct. 730 (1990)

As a general principal, handicapped children must be placed in the least restrictive environment appropriate to the child. *See* 20 U.S.C. § 1412(5) and 20 C.F.R. § 300.550.

2. The parents of a handicapped child are required to exhaust their administrative remedies before seeking redress in federal court. *Crocker v. Tennessee Secondary Schools Athletic Association,* 873 F.2d 933 (6th Cir. 1989). The United States Court of Appeals for the Sixth Circuit has explained the important interests in requiring such exhaustion:

> The policies underlying this exhaustion requirement are both sound and important. States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the Act. Federal Courts — generalists with no experience in the educational

> needs of handicapped students — are given the benefit of expert fact finding by a state agency devoted to this very purpose. Such a mechanism is necessary to give effect to a fundamental policy underlying the EHA: "That the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education". *Smith v. Robinson*, 468 U.S. at 1012, 104 S.Ct. at 3468. For the federal courts to set themselves up as the initial arbitrators of handicapped children's educational needs before the administrative process is used, they would endanger not only the procedural but also the substantive purposes of the Act. Both the states and the federal government have a recognized interest in providing enforcement of the Act that is not only just but efficient.

Crocker, at 935.

The court concludes that the plaintiffs failed to exhaust their administrative remedies in failing to seek a due process hearing following the school system's determination that Jason was not entitled to special services under the Act. As a result of this failure to exhaust, contrary to the purposes of the Act, Jason was placed in the most restrictive setting possible, an acute care mental institution. If plaintiffs had pursued their administrative remedies, a lesser restrictive alternative might have been found. As it was, Jason went directly from the least restrictive environment possible, a public school, to the most, a locked ward in a psychiatric hospital. Plaintiffs failure to exhaust their administrative remedies was, in this case, more than simply a technical deficiency.

Appendix C

3. In determining whether a Government agency is responsible for costs of a child's placement under the EHA, the analysis must focus on whether placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that are necessary apart from the learning process. *Clovis Unified v. Office of Administrative Hearings*, 903 F.2d 635, 643 (9th Cir. 1990). In this case, the court concludes that plaintiff's placement at the Peninsula Psychiatric Hospital was primarily medical. Therefore, those expenses are not reimbursable under the Act. In addition, even if it could be concluded that plaintiff's placement was primarily educational, plaintiffs have provided the court no breakdown between the educational expenses and others which are clearly medical in nature. Accordingly, even if plaintiffs were entitled to reimbursement in this case, the court would be unable to set the amount of the reimbursement.

III.

Conclusion

Based on the foregoing, the decision of the administrative law judge denying plaintiffs' entitlement to reimbursement for private placement of their child is hereby affirmed, and this action is dismissed.

Order accordingly.

s/ James H. Jarvis
JAMES H. JARVIS
UNITED STATES DISTRICT JUDGE

APPENDIX D — FINAL ORDER OF THE TENNESSEE STATE DEPARTMENT OF EDUCATION DATED OCTOBER 25, 1989

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

No. 89-23

IN THE MATTER OF:

JASON BABB

v.

KNOX COUNTY SCHOOL SYSTEM

FINAL ORDER

Case No. 89-23

I.

INTRODUCTION

The child has requested a Due Process Hearing under applicable law. He argues that he is entitled to reimbursement by the School System for his unilateral placement in a private setting because the placement was educational in nature. The School System takes the position that the placement was medical and is not subject to reimbursement.

II.

CONCLUSION

The child is not entitled to reimbursement because the placement was not for educational purposes.

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III.

REASONING

One week before the private placement was made the child's stepmother signed a School System evaluation report finding the child had no handicapping condition justifying special education services.[1] The stepmother is articulate and intelligent and there is no hint of coercion or artifice by the School System.[2] The only conclusion to be drawn is that the stepmother agreed with the School System's finding that the child was not entitled to special educational services; therefore, it is obvious that the private placement was made for other, non-educational reasons. This conclusion is further supported by proof in the record of extensive medical/psychiatric treatment received by the child in the private placement from the very beginning.

It is important to note that even if the private placement were educational in nature there could be no reimbursement in this case. The record in this case shows nothing but a lump-sum billing from the private placement. Nowhere is there any breakdown of charges, defining what portion was for room and board, what part was for medicine, or what part was for educational and related services. It is incumbent upon the child to establish the amount

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1. While the issue of the School System's failure to identify the child as seriously emotionally disturbed has been raised, this issue does not bear upon the result in this case.

2. Had there been an indication of bad faith on the part of the School System in obtaining the stepmother's signature the result in this case might have been different. However, there is nothing in this extensive record to suggest anything but honesty and candor from all parties.

of reimbursement, and absent proof sufficient to permit the Hearing Officer to determine an appropriate amount, no amount can be awarded.

For the purposes of this Hearing the School System is the prevailing party.

III.
ORDER

IT IS ORDERED that this matter be dismissed.

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such Appeal or review must be sought within sixty (60) days of the date of entry of a Final Order in non-reimbursement cases or three (3) years in cases involving educational costs and expenses. In appropriate cases the reviewing Court may order that this Final Order be stayed.

DONE this 25th. day of October, 1989.

s/ John D. Kitch
JOHN D. KITCH -4569
ADMINISTRATIVE LAW
JUDGE
Suite 305
2300 Hillsboro Road
Nashville, Tennessee 37212
(615) 385-9911
FAX (615) 385-2757

Appendix D

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document has been sent by postage prepaid mail this 25th day of October, 1989, to counsel for the School System and the child.

s/ John D. Kitch
JOHN D. KITCH

ADDRESSES

John D. Kitch, Esq.
Suite 305
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APPENDIX E — SUMMARY OF MINUTES DATED JULY 31, 1989

FAMILY MEETING

BABB, JASON
PPH - 7819 7-31-89

This is a summary of the minutes of a meeting yesterday, July 31, 1989, with Mr. and Mrs. Joseph Babb, which was held at Mrs. Babb's request. Those present were Magie Singleton, Ph.D., Becky Shimony, L.C.S.W., Steve Goudelock, M.D. and Diane Gardner, Director of Adolescent Services. Also present in the hospital but not at the meeting was Brenda McGhee, the Babbs' attorney, who stayed outside the meeting so that the Babbs could confer with her while the meeting was in process. The parents began the meeting by expressing their concern about bringing Jason home. They are afraid for themselves and their other child. They stated they do not want Jason at home. Mr. Babb began the session by asking the question, "What is Peninsula's basis for discharging Jason?" The response from Dr. Singleton was that during Jason's evaluation conference they explained to the Babbs that they recommended six to eight weeks more treatment in Peninsula Hospital. Treatment team's recommendation was long-term treatment in a residential treatment center or a therapeutic group home after his hospital stay. It was explained to the Babbs that Peninsula's program is an acute care setting and not what is required for Jason. The Babbs asked us the question, "So you don't think he's okay?" The answer from Dr. Singleton and Becky was no. Mrs. Babb asked if Peninsula's long-term treatment program was an appropriate placement for him. We answered that the Village, which is Peninsula's long-term treatment program, is not an appropriate placement for Jason and that the Village would not accept him. Again, the Babbs asked, "What does Jason need, then?" The answer from the Peninsula staff was that he

needs a residential treatment center or a therapeutic group home. If money was no object, there are several appropriate placements for Jason, and those that were mentioned were Deveraux, Jabneel or Highlands in North Carolina as examples of residential treatment centers or therapeutic group homes that would be appropriate. The Babbs asked, "What do we do? What treatment do we follow?" Dr. Goudelock explained the difference between acute care, chronic treatment centers, residential treatment centers and group homes and explained the difference primarily in terms of as you move from acute to therapeutic group home placement, there is a decrease in the number of staff and the intensity of treatment. At this point, Mrs. Babb asked us if we would extend his treatment here. His discharge date is set for August 1. Mr. Babb cut Mrs. Babb off and asked to leave the room to talk with Ms. McGhee, who was sitting out in the hall. While Mr. Babb was out of the room, Dr. Goudelock asked Mrs. Babb, "What do you hope to accomplish?" Mrs. Babb's answer was, "Public Law 94-142." Ms. Shimony expressed her concern about the length of time this type of process takes, and Mrs. Babb's answer was, "No it doesn't, we are working on that." Ms. Shimony explained to Mrs. Babb that an alternative option would be that Jason go stay with his grandmother, who seems to be willing to take him (at least that is the information we have had). The grandmother lives in North Carolina. Becky further explained that the grandmother is less emotionally involved with Jason and is in a better place to not focus on his past behavior and deal with the hear and now. She further explained to Mrs. Babb that Peninsula's program is not set up to keep Jason for long-term treatment. She further went on to say that going with the grandmother is not a perfect solution, but it seems the best solution at this time given the fact that, for financial reasons, the Babbs are unable to place him in a residential treatment center. When Mrs. Babb was asked what kind of places she is looking at and

what kind of options she was exploring, her answer was, "Public Law 94-142, and we are talking with Duncan and Gore." It was further explained to Mrs. Babb that we contacted 15 different places — residential treatment centers and therapeutic group homes — in order to try to place Jason or to assist in the placement. However, we only explored places in Tennessee because of Medicaid. Mr. Babb had returned by this time and said that Medicaid has not de-certified Jason for acute care. Dr. Singleton responded by saying we have already gone two months beyond what we initially set as a discharge date for Jason and asked, "Do you see an end in sight?" Mr. Babb's response was, "We are trying. We don't expect you to raise him and keep him for another year. Are you willing to give us an extension though, and if so for how long?" Dr. Goudelock's response was, "What will be different in September and October than now? We can't be in a position to keep on going on forever with no finite end and no plans." Ms. Shimony explained to the Babbs that when we hold kids, we typically see regressed behavior and that this is detrimental to the patient. Mr. Babb's response was that he was concerned about Jason losing whatever progress he had made here if they took him from Peninsula and were unable to place him immediately in another treatment center. The response from Dr. Singleton was tht Jason may be able to manage if he knows he is working towards something — working towards placement — and that Jason has expressed that he wants to be with his grandmother. She further explained that Jason has also said that he is interested and wants to go to a residential treatment center or group home. Mr. Babb said, "We are not sure that the grandmother can keep him. Her husband has been hospitalized." Dr. Singleton said that Jason had told her that he had talked with his grandmother on Friday and that Jason's feeling was that what was expressed by the grandmother was that she was ready for him to come and wanted him to come be with her. Mr. Babb

at no point denied that that might be true. He just felt that it would be difficult given the situation with the husband who was hospitalized. Mr. Babb said, "You all are the professionals. What do we do?" Dr. Singleton responded that the bottom line is finances, there are places that would take him if the finances were available. Mrs. Babb asked if we would write a letter saying that Jason will not harm anyone if he is discharged on August 1. The answer was, "No, we are recommending as a first option residential treatment, if that is not possible, that he go to live with his grandmother." Mr. Babb asked if we would be willing to coordinate a time through the hospital attorney and their attorney, Ms. McGhee, that we would be willing to extend his stay at Peninsula. Someone in the group said, "Such as what time?" Mr. Babb's response was, "Well, until August 31 if Medicaid will certify another 30 days." Ms. Shimony responded by saying, "This would be a set up. What happens after August 31? Would you ask for another extension? This is a set up to Peninsula, to Jason and to you, the parents. It is very unfair to keep this in limbo with no finite date in mind." Again, Mr. Babb left the room to confer with Ms. McGhee. When Mr. Babb returned and stated that we would have closure on this if Peninsula's attorney, would meet with their attorney. Dr. Goudelock responded by saying that that did not feel comfortable to him having lawyers making decisions that require medical expertise and that it is not indicated that Jason at this time will benefit from continued acute care. Mr. Babb stated that he could not agree to any fixed date now, but the attorneys could probably work something out. Dr. Goudelock said, "I am not sure that we can agree not to have a fixed date right now. We cannot continue to have an indefinite resolvement of this issue." Dr. Goudelock closed the meeting by saying, "We will give you a call in the morning and let you know where the hospital stands on this issue."

Appendix E

s/ Diane Gardner
Diane Gardner
Director, Adolescent Services

DG:lm

Supreme Court, U.S.
FILED
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NO. 92-455

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

KNOX COUNTY SCHOOL SYSTEM
PETITIONER

VS.

JASON BABB, A MINOR, THROUGH HIS PARENTS
AND NEXT FRIENDS, JOE AND SHARON BABB
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent adopts by reference the opinion of the Court of Appeals as Respondent's Statement of the Case.

REASONS FOR DENYING THE WRIT

I.
THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUES IN THIS CASE.

Under the Individuals With Disabilities Education Act, a disabled student may be placed in a residential program if that is "necessary to provide special education and related services." 34 C.F.R. Section 300.302. In such cases, the school system pays for the residential program, including non-medical care and room and board. Id. A comment to this regulation says that the regulation applies to placements made for educational purposes.

Petitioner argues that the Third and Ninth Circuits applied an "educational purpose" test in Clovis Unified School District v. California Office of Administrative Hearing, 903 F.2d. 635

(9th Cir. 1990) and Kruelle v. Newcastle County School District, 642 F.2d. 687 (3rd Cir. 1981) to determine whether school systems should pay for residential programs. Petitioner contends that in this case the Sixth Circuit did not apply an educational purpose test. Petitioner relies on the following language in the Sixth Circuit's opinion to support this argument: "Any attempt to distinguish academics from treatment when defining 'educational placement' runs counter to the clear language of the act." 965 F.2d. at 109. Viewed in context, this sentence is nothing more than a simple recognition that the concept of education under the Act is broader than traditional academics.

There is no conflict between the Sixth Circuit's decision in this case and the Ninth Circuit's decision in Clovis.

In Clovis, the Court ruled that the psychiatric hospital in that case was not a residential program within the meaning of the Act because it did not have an educational component.

A few months after Clovis, the Ninth Circuit decided Taylor v. Honig, 910 F.2d. 627 (9th Cir. 1990). In Taylor, the Court affirmed the District Court's preliminary injunction placing a disabled child in a psychiatric hospital in Texas. The panel in Taylor distinguished Clovis on several grounds. The psychiatric hospital in Clovis did not have an educational component. Students at the hospital received education from the local school district. Furthermore, the child in Clovis had been admitted in response to an acute psychiatric crisis. The residential program involved in Taylor was both a hospital and a state-

approved school. In addition, the child in Taylor was medically stable. Thus, the placement was for educational, rather than medical purposes. 910 F.2d. at 632.

The facts of this case are similar to those in Taylor. The facility involved in this case is a psychiatric hospital which contains a "specially designed educational program for emotionally disturbed children." 965 F.2d. at 105. The school is state certified. It is also apparent that the placement was made in response to an educational, rather than a medical crisis. Jason Babb's behavior had become intolerable to school officials. His parents had been informed that his expulsion was imminent. They removed Jason from school and placed him in the residential program after they received

this information. Id. There is no conflict between this case and Clovis; Clovis involves different facts. Taylor and this case are in harmony.

Nor is there any conflict with the Third Circuit's decision in Kruelle. The language in this case that Petitioner contends is in conflict with Kruelle is a quotation from Tilton v. Jefferson County Board of Education, 705 F.2d. 800 (6th Cir. 1983). The Tilton Court cited Kruelle in support of this language. 700 F.2d. at 803.

Likewise, the Ninth Circuit in Taylor relied on Clevenger v. Oak Ridge School Board, 744 F.2d. 514 (6th Cir. 1984). 910 F.2d. at 628, 632. Clevenger is included with Tilton in a double citation in this case. 965 F.2d. at 109. Thus, not only is there an absence of conflict, the three Circuits are linked

by mutually supportive citations on this issue.

II.
THIS CASE INVOLVES A ROUTINE APPLICATION OF BURLINGTON SCHOOL COMMITTEE V. MASSACHUSETTS DEPARTMENT OF EDUCATION, 471 U.S. 359 (1985).

As the Sixth Circuit determined, the facts in this case fit squarely within this Court's decision in Burlington School Committee v. Massachusetts Department of Education, 471 U.S. 354 (1985). In Burlington, a unanimous Court held that reimbursement was an appropriate remedy under the Individuals With Disabilities Education Act. The Sixth Circuit correctly applied the Burlington holding that when the decision of parents to place a child in a private school is right, an order requiring the

public schools to reimburse the parents is appropriate relief under Section 1415(e)(2) of the Act.

III.

THE SIXTH CIRCUIT CONSIDERED THE ISSUE OF THE LEAST RESTRICTIVE ENVIRONMENT IN DECIDING THIS CASE.

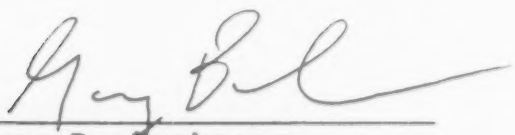
Petitioner argues that the Sixth Circuit ignored the Act's preference for placement in the least restrictive environment. This is incorrect. The Court addressed this issue directly. 965 F.2d. at 104. The Court concluded that under the facts and circumstances of this case, there was no less restrictive alternative to the placement selected by the parents. The residential program in which Jason was placed by his parents was the most appropriate setting for his education and treatment. See, Alamo Heights Independent School District v.

State Board of Education, 790 F.2d. 1153, 1161 (5th Cir. 1986); McKenzie v. Smith, 771 F.2d. 1527, 1535 (D.C. Cir. 1985).

CONCLUSION

This case involves a routine application of clear and well-established law to the facts of this particular case. It is not a case that should be reviewed by the Supreme Court. The petition should be denied.

Respectfully submitted,



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